BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The opinion of the Circuit Court of Appeals for the Eighth Circuit is found printed in the record of the proceedings of the Circuit Court of Apeals, and was decided December 13, 1943.

Jurisdiction

The statutory provisions and rules of the Court which are believed to sustain the jurisdiction of this Court are Section 41(8), 28 U. S. C. A. (Judicial Code) 24, Rule 38 of the United States Court Rules, and Section 16(b) of the Fair Labor Standards Act.

Opinion of Court Below

The opinion of the Circuit Court states that "This is an appeal from an order sustaining a motion for summary judgment for defendant in an action brought by defendant's employees for overtime wages and liquidated damages under the provisions of the Fair Labor Standards Act of 1938. The motion for summary judgment was sustained on the ground that plaintiff and other building maintenance employees on whose behalf the action was brought are not covered by the provisions of the Act."

Statement of Case

In the District Court, the action was commenced in behalf of petitioner and for and in behalf of all employees similarly situated, including Harry Payne, John Rosebaugh, Joel D. Simmons and C. F. Smith, as a class suit. A stipulation was entered into as to the facts in the case, wherein it was agreed that petitioner was authorized to bring the action in behalf of those whom he represents; that respondent is a National Banking Association and

conducts the usual commercial banking operations; that respondent is the owner of the Omaha National Bank Building, consisting of eleven floors and a basement, and sub-basement, respondent occupying for its banking business a part of the basement, all of the first and about one-half of the second floor of the building, and also some storage space in the sub-basement, occupying in all approximately one-fifth of the rental space in said building; that the balance of the building is rented to a large number of tenants, including insurance agents, realtors, contractors, a radio broadcasting station, investment companies, a stock broker, and lawyers, some of these tenants being engaged in interstate commerce; that petitioner was one of the night engineers with the chief duty of looking after the heating of the building during the night; that Payne, Rosebaugh and Simmons were employed as night watchmen and janitors about the building; that Smith was a painter who painted and decorated portions of the building, including some work in the bank itself; that all of said employees were employed and paid by respondent.

The motion for summary judgment filed by respondent was sustained by the District Court on February 15, 1943, and the petition of this petitioner was dismissed.

Within the statutory time, petitioner appealed to the Circuit Court of Appeals of the Eighth Circuit. The case was presented to the Appellant Court on November 2, 1943, and the said Court rendered its opinion on December 13, 1943, affirming the action of the District Court.

Specification of Errors

1. Both the District Court and the Circuit Court of Appeals erred in holding that neither petitioner nor those

whom he represents, and none of them, come under the provisions of the Fair Labor Standards Act of 1938.

2. That both Courts erred in holding that the case of *Johnson vs. Dallas Downtown Development Co.*, Fifth Circuit, 132 F. (2d) 287, Cert. den., 63 S. Ct. 994, involved the identical issue of the instant case.

3. The Circuit Court erred in holding that the principles enunciated in the case of *Noonon vs. Fruco Construction Co.*, No. 12,637 of said Circuit, are for the most part applicable to the case now before this Court.

4. Both Courts erred in upholding the motion of respondent for a summary judgment and dismissing the action of this petitioner.

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ARGUMENT

The Act provides for the payment of overtime compensation for employees who may be covered thereunder. It defines "production of goods for commerce." However, it fails to define interstate commerce. Can it be said that because of the failure of Congress to so define, that we may not give it a definition? It seems clear that the reason for the failure was the fact that "interstate commerce" had already been defined in the Federal Employers Liability Act and therefore no further definition was necessary.

In the instant case, there are three possibilities of coverage under the Act. First, we have watchmen or guards; second, we have an engineer of the heating unit of the building; third, we have an interior decorator. A

watchman or guard is not only necessary to the movement of goods in interstate commerce but actually essential. A watchman or guard protects the building and the contents thereof from fire, theft and depredation. What do we have within the Omaha National Bank Building and within the bank itself? We have many important documents and, more important, money in the form of currency and coin, some of which is the life saving of many depositors. Is it not important that this money be protected against fire and theft, and that these documents and money be preserved for the protection of the owner? It might be argued that the bank could do business without this protection. By the same token, could not the bank do business by mail? It might also be argued that a building is not essential in which to do business since, if it burns, it might be replaced. By the same token, is it not true that a cashier of a bank is not essential since in case of his death, he might be replaced? What, then, is essential? In the first place, the courts have held that it is not a prerogative that a person must be essential, but that it is sufficient if the person is necessary to the free movement of goods in interstate commerce. We must draw the line of demarcation. Where shall that line be drawn? Can we be arbitrary and say that it is true that a watchman renders valuable service in the protection and preservation of property and by the same breath utter a denunciation of the importance of that particular job because that person does not actually transmit money or goods in interstate commerce? Can we disregard the services of a watchman merely because a bank could do business by mail or possibly out in the street where no building is necessary? No, the bank has set up these facilities not only for convenience but more so for the protection of the depositor and the bank as well. A watchman is not

a mere janitor who renders service merely for the convenience of the bank and its depositors. The word convenience is too elementary and too easily twisted for the convenience of those who would twist it about in order to satisfy their own selfish means. Why is it that a watchman assigned to the duty of merely watching goods or material which is intended will be shipped in interstate commerce come under the Act, if a watchman who protects and guards property, both real and personal, which might be the life savings of citizens of this country does not come under the Act? In this case, the Circuit Court, speaking through Judge Woodrough, admits that there is some paradox between the two given situations when he states in the last paragraph of his opinion:

> "While it is arguable that the establishment of a dual standard is not in consonance with the economic realities which prompted the enactment of the Fair Labor Standards Act, we cannot disregard the definitive language employed by Congress in framing the Act."

In interpretative Bulletin Number Five, issued by the U. S. Department of Labor, the administrator defines "goods," in referring to "articles or subjects of commerce of any character," as including publications, pamphlets, or any other written materials. We believe that it is uniformly held that a bank is engaged in interstate commerce.

An engineer is necessary to the movement of goods in interstate commerce because without heat in the building it would be physically impossible for the bank to carry on its business. Does an engineer come under the Act, or is the answer to that question "no," because a bank can do business not only without heat but also without a build-

ing? We must remember that the bank occupies about one-fifth of the building and it benefits by these services as well as do the tenants who lease from the bank.

The interior decorator is called upon to paint and decorate the walls and ceilings of the rooms of all the tenants of the building, including the rooms in the bank itself. Is it not "necessary," as that word is commonly used, for the bank to have this service in order to carry on its business without being forced to do so in a room littered with dirt and debris, but that it may have a pleasant environment which it, as well as its depositors, might enjoy?

The watchmen were not stationed out in the street merely observing passersby. They were stationed not only within the building but as well in the lobby and within the bank building itself, being near and about the documents and money which were confined within the vaults and other parts of the rooms of the bank.

In the case of *Bank of America*, 14 N. L. R. B. 207, Board held that the bank was subject to the Act for the following reasons:

1. There was a transmission of money for customers from one state to another.

2. The bank issued letters of credit and bank drafts secured by bills of lading.

3. The bank discounted trade acceptances.

4. The bank's mailing system connection with the Federal Reserve system.

5. The bank's admission that a strike would paralyze commercial life.

The pleadings as shown by the record allege that the employees come under the Act not only because they are engaged in a service necessary to the carrying on of interstate commerce, but also because they are engaged in a service affecting the production of goods for commerce. Respondent filed a motion for summary judgment, which in effect constitutes a demurrer and admits the truth of all facts well pleaded.

In the case of *Reliance Storage Company vs. Hubbard*, 50 F. Supp. 1012, the Court referred to Section 203(j) of the Act, stating:

> "An employee shall be deemed to have been engaged in the production of goods while producing, mining, manufacturing, handling, transporting, or in any other manner working on such goods, or in any process or occupation thereof, in any state,"

which allegation is part of the pleadings of this petitioner. In the Hubbard case, the Court held that a watchman comes under the Act because of the nature of his duties in protecting property from fire and theft.

In the cases of *Kirschbaum vs. Walling* and *Walling vs. Arsenal Building Corporation*, 62 S. Ct. 1116, 316 U. S. 517, decided by this Court, Justice Frankfurter, in his opinion, states in part as follows:

> "We start with the weighty opinions of the two Circuit Courts of Appeals that the employees here are within the Act because they were engaged in occupations 'necessary to the production' of goods for commerce by the tenants. Without light and heat and power the tenants could not engage, as they do, in the production of goods for interstate commerce. The maintenance of a safe, habitable building is indispensable to that activity. The normal and spontaneous meaning of the language by which Congress defined

in par. 3(j) the class of persons within the benefits of the Act, to-wit, employees engaged 'in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof,' encompasses these employees, in view of their relation to the conceded production of goods for commerce by the tenants."

This Court went on to say:

"* * * In our judgment, the work of the employees in these cases had such a close and immediate tie with the process of production for commerce, and was therefore so much an essential part of it, that the employees are to be regarded as engaged in an occupation 'necessary to the production of goods for commerce.' What was said about a related problem is not inapposite here: 'Whatever terminology is used, the criterion is necessarily one of degree and must be so defined. This does not satisfy those who seek for mathematical or rigid formulas. But such formulas are not provided by the great concepts of the Constitution such as '"interstate commerce"', '"due process,"' '"equal protection."' In maintaining the balance of the constitutional grants and limitations, it is inevitable that we should define their applications in the gradual process of inclusion and exclusion."

In the case at bar, are not the employees engaged in a process or occupation necessary to the handling and transporting of goods in interstate commerce? Where shall we draw the line? Is not the heat, light and power which is generated for the use and benefit of bank employees in the carrying on of its business just as necessary and essential as the light, heat and power which is generated for the use and benefit of the persons engaged in an occupation necessary to the production of goods for commerce? We believe that a line of distinction between

the two given situations must necessarily be one of an arbitrary nature and cannot be in accordance with the fundamental principles of jurisprudence in the matter of inclusion and exclusion with respect to the rights of parties who might be covered by the Act.

In the *Noonan* case, supra, decided by the Circuit Court for the Eighth Circuit, the facts are not identical nor even similar to the case at bar. In the *Noonan* case, the employees were watchmen about a building which was being constructed for the intended purpose of manufacturing goods which were expected to be sent in interstate commerce. We think that employment would be quite remote from coming under the Act since the building was still under construction and no goods were being manufactured therein. That situation is covered by the administrator of the Act on page 7 of interpretative Bulletin Number Five, wherein it is stated: "Thus, it is our opinion that employees engaged in the original construction of buildings are not generally within the scope of the Act, even if the buildings when completed will be used to produce goods for commerce." In the present case, not only does the building exist, but interstate commerce is actually being carried on therein. The Circuit Court surely erred in using the *Noonan* case as an analogy for the case at bar.

In the case of *Threlkeld vs. McLeod*, supra, decided by this Court, in a five-to-four decision, the employee was not hired and paid by the railroad company. He was engaged by a contracting company who agreed to render the services of a cook to a railroad gang working on a railroad section. The Court denied the writ, Justice Murphy dissenting and stating in part:

"In using the phrase, 'engaged in commerce' Congress meant to extend the benefits of the Act to employees through the farthest reaches of the channels of interstate commerce.' "

In any event, a denial of a writ by this Court does not indicate an expression of opinion on the merits of the case.

Merely cooking food for the men who maintain an interstate right of way seems a step substantially removed from cleaning the cars used in such transportation. Because an interstate bank's premises are immobile and the cars moved is no ground of distinction. For an analogy to support the majority opinion, this Court would have to hold that one employed in the cleaning of railway tools and tool houses, both facilities of the maintenance-of-way men, was not serving interstate commerce.

In the case of *Lorenzetti vs. American Trust Company*, 45 F. Supp. 128, wherein this Court denied a writ, Justice Denman of the Circuit Court for the Ninth District states, in part, as follows:

"The question is whether the services are a direct aid to interstate commerce. Here it is not only such an aid but it is conceivable that a bank which had no janitorial service and permitted the litter of its transactions and its dust and dirt to accumulate would cease to function. I can see no difference between the 'porters, (who) keep the buildings clean and habitable' for the men and processes for the production of goods for commerce held within the Act in Kirschbaum Co. vs. Walling, 316 U. S. 517, 519, and the janitors who keep the buildings clean and habitable for the men and processes in interstate banking. I do not believe that McLeod vs. Threlkeld overruled, sub silentio Kirschbaum Co. vs. Walling."

In the case of *Johnson vs. Dallas Downtown Development Co.*, the employees were hired and paid by the Dallas Company, who operated an office building. There was no bank involved wherein interstate commerce was carried on. The facts are not identical with the case at bar. Both the District Court and the Circuit Court erred in deciding the present case upon the issues presented in the *Johnson* case.

In the instant case, the Circuit Court, in its opinion, states, in part, as follows:

> "Neither the plaintiff nor those for whom he brought this action are employed by the tenants of the building, nor do they perform any separate service for any of the said tenants, but are engaged solely in the maintenance and operation of the defendant's office building for and on behalf of the defendant."

We agree that the employees are hired directly by and paid by the respondent bank. Is not that fact a point in favor of the employees as against the respondent bank? Surely, if the employees were hired and paid by the tenants severally, a cause of action against the respondent bank would not be as strong in favor of recovery. The cause of action here is against the respondent bank and not against the tenants who had nothing to do with the hiring of the employees except possibly through their arrangement in leasing their respective space in the building wherein these services of the employees inured to all of the tenants, including the bank itself.

The Circuit Court for the Eighth Circuit has decided an important question of law in apparent conflict with the decisions of this Court. It is a Federal question and was probably the first case of its kind to reach the Circuit Court for adjudication. No other Federal Court case

which has been taken to the Supreme Court involves the identical set of facts involved in the present case. The question involved is one which should be decided and settled by this Court for future reference. The Fair Labor Standards Act is a comparatively new law and its provisions, as indicated by the decisions of some of the lower courts, are somewhat confusing. Each case must be decided on its merits. Until this Court has ruled on the merits of the case at bar, there will always remain a doubt as to whether employees situated as are those employees in the present case come under the Act. It seems to us the granting of a writ and a subsequent decision in this case would be an enlightenment to the bar at large as well as to all litigants as to the scope of the Act with respect to the field of jurisprudence. We do not think that this Court will leave all employees similarly situated under identical circumstances to grope their way in the dark, unguided and unaided by the helping hand of this Honorable Court. We believe that sufficient reasons lie for the granting of a writ in this case.

Very respectfully submitted,

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